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No. 88-531

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

HERMAN SOLEM, WARDEN
SOUTH DAKOTA STATE PENITENTIARY
and RICHARD D. RIST, ASSOCIATE WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioners,

v.

WILLARD RALPH VOSBURG

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners, the Warden and Associate Warden of the South Dakota State Penitentiary, seek to overturn a jury determination that they had violated the Respondent's Eighth Amendment right to be free from cruel and unusual punishment, by allowing him to be the object of repeated sexual assaults by other inmates. Petitioners have never questioned the appropriateness of the legal standard applied by the trial court in its jury instructions; nor do they ask this Court to review what has become settled law. Instead, Petitioners ask this Court to review the sufficiency of the evidence to establish liability in this case.

The question presented is:

1. Whether the United States Court of Appeals for the Eighth Circuit properly upheld the jury's verdict against a sufficiency of the evidence challenge, where the record is replete with evidence of sexual assaults both on the Plaintiff and other younger inmates, where instances of such assaults had been brought to the Petitioner's attention prior to the Respondent being assaulted, and where the Petitioners failed to take steps to address the problem of such assaults in their institution.

LIST OF PARTIES

Petitioner Herman Solem is the Warden for the South Dakota State Penitentiary. Richard D. Rist is the Associate Warden for Custody at the South Dakota State Penitentiary.

Willard Ralph Vosburg, Respondent, was an inmate at the South Dakota State Penitentiary, who instituted a civil rights action after having been repeatedly raped by several inmates while in prison.

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v.

WILLARD RALPH VOSBURG
Respondent.

BRIEF IN OPPOSITION

Willard Ralph Vosburg, Respondent, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this cause. The decision of the Court of Appeals is reported at 845 F.2d 763 (8th Cir. 1988).

STATEMENT OF THE CASE

1. **Procedural History.**

Willard Vosburg instituted a lawsuit against the Petitioners alleging that his right to be free from cruel and unusual punishment had been violated, when he was

repeatedly raped at the South Dakota State Penitentiary by other inmates. The lawsuit was instituted under 42 U.S.C. § 1983. After counsel was appointed to represent Mr. Vosburg, the Complaint was amended to include a negligence claim. Following a five day trial, the jury returned a verdict awarding Mr. Vosburg $10,000 on his Section 1983 claim. The jury returned a verdict for the Defendants on the negligence claim.

The Court instructed the jury that the defense of contributory negligence applied only to the negligence claim and not to the civil rights claim. The Petitioners did not object to submitting the case to the jury in this manner. Under South Dakota law, if a plaintiff is contributorily negligent more than slight, his claim is completely barred. Thus, the jury concluded that the Plaintiff's contributory negligence barred his negligence claim, but that the Petitioners acted with reckless disregard of his right to be free from sexual assaults, and accordingly found against them on the civil rights claim.

The district court submitted the issue of liability on the civil rights claim to the jury under the following instruction:

> Prison officials may be liable for a violation of a prisoner's civil rights where they are deliberately indifferent to a prisoner's constitutional right to be free from sexual attacks by other inmates, if they actually intend to deprive him of that right, or if they act with reckless disregard of this right.
>
> Reckless disregard of a prisoner's right to be free from sexual attacks by other inmates may be shown by the existence of a pervasive risk of harm to inmates from other prisoners and a

> failure by prison officials to reasonably respond to that risk.
>
> A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or to isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular institution. It is enough that violence and sexual assaults occur with sufficient frequency that prisoners are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures.
>
> It is not necessary to show that all prisoners suffer a pervasive risk of harm. It is enough that an identifiable group of prisoners do, if the complainant is a member of that group.

Vosburg v. Solem, 845 F.2d 763, 765-66 (8th Cir. 1988). The Petitioners did not object to the giving of this instruction, did not challenge it on appeal to the Eighth Circuit, and have not sought its review in their petition to this Court.

After the return of the verdict in favor of Mr. Vosburg, the Petitioners filed a motion with the district court for a judgment notwithstanding the verdict and a new trial, claiming that insufficient evidence existed to support the verdict. The trial court denied these motions, and the Eighth Circuit affirmed the judgment. Interestingly enough, even the dissenting judge on the Court of Appeals agreed that the district court properly denied the motion for judgment notwithstanding verdict and new trial on the question of liability.

In the face of this record, the Petitioners now ask this Court to reweigh the evidence and to set aside the jury's verdict on the grounds of insufficiency of the evidence.

2. **Statement of the Facts.**

Willard Vosburg was convicted of possession of a stolen motor vehicle and sentenced to the South Dakota State Penitentiary. He began serving his sentence on December 16, 1982. At the time, he was 19 years old and weighed approximately 135 pounds. He had never been in prison before.

Shortly after Mr. Vosburg's admission in the intake area, he was double-celled with an inmate who was convicted of killing his own natural mother in the heat of passion. This double-celling took place with the knowledge and acquiescence of both Warden Solem and Associate Warden Rist, who knew the nature of the crimes for which both inmates had been convicted.

Mr. Vosburg was raped at night by his cellmate, and was told that if he notified the authorities of the rape he would be killed. Following this rape, word travelled throughout the prison that Mr. Vosburg had been raped. Three other inmates on three separate occasions then raped Mr. Vosburg. Mr. Vosburg did not report the rapes, because he had been threatened by these inmates and was afraid.

During the trial, other inmates testified that they, like Mr. Vosburg, had been sexually assaulted at the South Dakota State Penitentiary. Kenneth Thomas testified that he was raped each night for the first eight nights while he was double-celled in the intake area in 1981. He reported this to both Rist and Solem. He asked to have the individual who raped him prosecuted, and was told by Rist that if he made waves he would be endangering his life. Solem and Rist, therefore, were well aware of sexual assaults in the intake area because of their double-celling practices, even before Mr. Vosburg came to the penitentiary.

Another inmate, Steven Headrick, was forcibly raped on three different occasions by his cellmate, while double-celled in protective custody. Mr. Headrick attempted to commit suicide after having been raped and informed Warden Solem of the rape.

The Petitioners' principle argument before this Court centers on their claim that insufficient evidence existed concerning the level of violence and sexual assaults at the penitentiary to put a prisoner such as Mr. Vosburg in fear for his safety. The Court of Appeals for the Eighth Circuit had no difficulty in concluding that sufficient evidence existed to submit this issue to the jury. As the Eighth Circuit observed:

> The evidence contains specific and detailed accounts of the four separate instances in which Vosburg was sexually assaulted. Other young inmates also gave evidence that they had been raped repeatedly at the penitentiary, both in the intake area and other locations throughout the facility. Both sides presented statistical evidence as to the level of violence and sexual assault in the penitentiary. Vosburg also presented evidence that revealed that prison officials failed to refer assaults to the local prosecutors. The prison official in charge of investigating crimes at the South Dakota State Penitentiary testified that of approximately 500 crimes investigated by him between 1984 and 1985, only two or three were referred to prosecution. Conversely, the defendant's own expert witness, Warden Winston Satran of the North Dakota State Penitentiary, testified that <u>all</u> crimes committed in the North Dakota institution are referred to the local prosecutor. Furthermore, disciplinary reports

> revealed that there were over 140 instances of fighting and assaults from 1981 to 1985 in the South Dakota institution. None were referred to the local prosecutor. No sexual assaults at the South Dakota Penitentiary, including an instance in which an inmate had a broomstick shoved into his rectum, have ever been prosecuted. No inmate who has ever been accused of committing a rape in the South Dakota State Penitentiary, including Vosburg's assailants, has ever been disciplined.

Vosburg v. Solem, supra, 845 F.2d at 766. The court further correctly noted that "the record is replete with evidence of sexual assaults both on the plaintiff and upon other young inmates." *Id.* at 770. Moreover, a recognized expert in the area of prison rapes testified that as few as one in seventy-five sexual assaults in prisons are reported, and that one in every ten inmates in a prison such as the South Dakota State Penitentiary may be sexually assaulted.

Judge Magill, who concurred in part and dissented in part in the panel's decision, stated:

> The frequency of assault at the South Dakota State Penitentiary was sufficiently high that a jury might reasonably find a pervasive risk of harm to the prisoners. Appellants' failure to develop administrative policies to protect Vosburg and his fellow inmates in the intake area and other high-risk areas of the penitentiary clearly justifies a jury finding that appellants failed to respond reasonably to the risk of inmate assault.

Id. at 770. This case, thus, presents no issue which would require further review by this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

THE PETITIONERS HAVE FAILED TO IDENTIFY ANY MATERIAL CONFLICT AMONG THE CIRCUITS OR WITH APPLICABLE DECISIONS OF THIS COURT

The Petitioners, in an attempt to frame an issue that would warrant this Court's consideration, contend that the Eight Circuit's decision involves an important question of federal law that conflicts with decisions from this Court and other circuits. They fail to demonstrate, however, any conflict in the standard adopted by the trial court and approved by the Eighth Circuit with the standard that this Court or other circuits have repeatedly upheld. The legal standard incorporated into the jury instruction on the question of liability required the Respondent to prove *deliberate indifference and reckless disregard* for his right to be free from sexual attacks.

This Court has repeatedly affirmed these same legal standards in evaluating Eighth Amendment claims by prisoners. *See Whitley v. Albers*, _____ U.S. _____, 106 S. Ct. 1978, 1084 (1986); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

Moreover, Petitioners do not challenge the uniformly recognized principle that conditions of confinement in a prison implicate an inmate's Eighth Amendment right to be free from cruel and unusual punishment. *See Rhodes v. Chapman, supra; Hutto v. Finney*, 437 U.S. 678, 685 (1978); *see also Smith v. Wade*, 461 U.S. 30 (1983)

(upholding award of punitive damages for inmate who had been sexually assaulted by his cellmates in prison).

At base, the petition in this case asks this Court to overturn the judgment based upon a claim of insufficiency of the evidence. This argument was rejected by the district court and every judge on the Eight Circuit panel. No constitutional issue is raised by the petition. As this Court has often stated: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see also, Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Petitioners cite a series of cases from other circuits in an apparent effort to show a conflict in the circuits. *See Riley v. Jeffes*, 777 F.2d 143 (3d Cir. 1985); *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985); *Alberti v. Klevenhagen*, 790 F.2d 1220 (5th Cir. 1986). *Benson v. Cady*, 761 F.2d 335 (7th Cir. 1985). *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981). *Zatler v. Wainwright*, 802 F.2d 397 (11th Cir. 1986).

In *Riley v. Jeffes*, the Third Circuit, like the Eighth Circuit, recognized an inmate's constitutional right to be protected from threats of violence and sexual assault. 777 F.2d at 147. Moreover, the Third Circuit adopted the same standard as was applied in this case, stating: "To obtain relief, an inmate must show 'a pervasive risk of harm to inmates from other prisoners,' . . . and that the prison officials have displayed 'deliberate indifference' to the danger." *Id.*

The Fourth Circuit decision in *Shrader v. White, supra*, is also consistent with the Eighth Circuit's decision in this case. In *Shrader*, the court rejected a claim that negligence could suffice to support an Eighth Amendment violation. 761 F.2d at 979-980. The Court in

this case did not instruct the jury that negligence could suffice, but relied upon the well-recognized standard of reckless disregard and deliberate indifference. Moreover, to the extent that the Petitioners suggest *Shrader* sets a burden even higher than reckless disregard or deliberate indifference, they failed to object to the Court's instruction on that issue and, therefore, have not preserved that claim for review by this Court. *See City of Springfield v. Kibbe*, _____ U.S. _____, 107 S. Ct. 1114 (1987).

The Petitioners' reference to the Fifth Circuit's decision in *Alberti v. Klevenhagen, supra*, likewise, does not show a conflict in the circuits. The Fifth Circuit held: "Violence and sexual assault among inmates may rise to a level rendering conditions cruel and unusual." 790 F.2d at 1224. Indeed, the Fifth Circuit in that case upheld the determination that the Eighth Amendment standard had been violated by the level of violence and sexual assaults existing in the Harris County jails. *Id.* at 1226.

Petitioners seek simply to compare the facts in this case with the facts in that case to argue that a conflict exists. Such a fact-bound inquiry by this Court in evaluating Eighth Amendment claims among the circuits is not the type of conflict which justifies the grant of certiorari. This Court has frequently noted that a writ of certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Petitioners' reference to *Benson v. Cady, supra*, decided by the Seventh Circuit is inapposite. That case concerned

an Eighth Amendment claim involving medical care, not sexual assaults by other inmates. Moreover, the Seventh Circuit adopted the same standard for an Eighth Amendment violation as has the Eighth Circuit, *i.e.* deliberate indifference and reckless disregard.

The Tenth Circuit decision in *Ramos v. Lamm, supra,* cited by the Petitioners is likewise consistent with the Eighth Circuit's decision in this case. In fact, the Tenth Circuit in *Ramos* upheld the trial court's findings of an Eighth Amendment violation that the state had failed to reasonably protect inmates from threats of violence and assaults from other inmates. 639 F.2d at 574. There, as here, the court applied a deliberate indifference standard. Significantly, the court in *Ramos* cited with approval decisions from the Eighth Circuit which held:

> Merely because the current level of violence and illegal activity is statistically lower than in past years does not mean that the present situation meets minimum constitutional standards. *See Finney v. Arkansas Bd of Correction,* 505 F.2d 194, 201 (8th Cir.); *Holt v. Sarver,* 309 F. Supp. 362, 377 (E.D. Ark.), *aff'd,* 442 F.2d 304 (8th Cir.).

639 F.2d at 573 n. 18.

Petitioners' reference to the Eleventh Circuits decision in *Zatler v. Wainwright, supra,* not only fails to disclose a conflict in the circuit, but underscores the fact that no conflict in the circuit exists on the issue. Indeed, the Eleventh Circuit quoted with approval the Eighth Circuit's decision in *Martin v. White,* 742 F.2d 469 (8th Cir. 1984). 802 F.2d at 400-401. The only thing that may be gleaned from the opinion in *Zatler* is that insufficient

evidence existed in that case to support an Eighth Amendment claim.

CONCLUSION

The question presented for review by this Court represents yet another attempt by the Petitioners to have a court review the case based upon a sufficiency of the evidence challenge. The trial court and a panel of the United States Court of Appeals for the Eighth Circuit unanimously rejected this challenge to the judgment. Petitioners have failed to demonstrate that the decision of the Eighth Circuit conflicts with precedent in other circuits or with this Court's own rulings. Therefore, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Dated at Sioux Falls, South Dakota, this 10th day of October, 1988.

Respectfully submitted,

DAVENPORT, EVANS, HURWITZ, & SMITH

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a member of the bar of this Court and counsel of record in the within action and that this day he served the original and forty copies of the foregoing BRIEF IN OPPOSITION upon the Clerk of the United States Supreme Court and three copies thereof each upon all counsel of record by depositing such copies in the United States mail, postage prepaid, at Sioux Falls, South Dakota, in envelopes addressed to such persons at the addressed designated by them for that purpose, as follows:

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Dated at Sioux Falls, South Dakota, this 10th day of October, 1988.

\s\ Michael J. Schaeffer
Michael J. Schaffer

Sworn to before me this 10th day of October, 1988.

\s\ Cindy S. Sieber
Cindy S. Sieber
Notary Public, South Dakota
My Commission Expires: 10/18/92